

FILED

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

95 APR 14 PM 12:29

IN RE:

David M. Strong,

**ENTERED**  
APR 17 1995  
V. A. C.  
Debtor.

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA  
C/A No. 94-75489

**JUDGMENT**

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as stated in the attached Order of the Court, the real estate commissions payable to the Debtor under the Subject Contract and under the Debtor's agreement with Referral Associates, Inc., f/k/a Prudential/Hilton Head Properties are property of the bankruptcy estate and may not be excluded pursuant to 11 U.S.C. § 541(a)(6). The Trustee's objection to the Debtor's claim to an exemption in the commissions pursuant to S.C. Code § 15-39-410 is sustained.

*John E. Wailes*

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
April 14, 1995.

JUDGMENT INDEX # 95-144

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CHAPTER 7

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ORDER

V.A.G.

THIS MATTER came before me on March 29, 1995 upon the Objection by the Chapter 7 Trustee, ("Trustee"), to the Debtor's claim to an exemption in certain real estate commissions. Subsequent to a preliminary hearing which was held before me on March 1, 1995, the Debtor amended his argument to assert that the real estate commissions which were the subject of the objection were not property of the estate. In the alternative, the Debtor argued that, if the Court should find that the commissions were property of the estate, the Debtor should be entitled to claim an exemption in those commissions under S.C. Code §15-39-410.

Present at the hearing were Amy Campbell Kelly, attorney for the Trustee, the Debtor and his attorney, Daniel R. Denton.

FINDINGS OF FACT

The Debtor filed his bankruptcy petition on November 7, 1994. The contract at the center of this controversy was executed by Cherry Point Limited Partnership, ("Seller"), and Gilmour-Hamilton, L.L.C., ("Buyer"), on August 24, 1994, ("Subject Contract"). The Debtor testified that he had a verbal contract

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with the Broker, Prudential Hilton Head Properties, now known as Referral Associates, Inc., ("Broker"), under which the Broker agreed to pay a commission to the Debtor as its listing agent.

At the hearing, the Debtor, David M. Strong, testified and submitted numerous documents relating to post-petition services provided by the Debtor to Seller in connection with the closing of the sale. The Trustee asserted that the contract did not require any such services and that the right of the Debtor to receive the commission upon the sale of the property was not dependent upon any such services. The Trustee further argued that the services rendered by the Debtor post-petition were based upon his relationship with and/or ownership interest in the Seller and not merely as a real estate agent.

#### CONCLUSIONS OF LAW

1. THE REAL ESTATE COMMISSIONS IN DISPUTE ARE PROPERTY OF THE ESTATE WHICH MAY NOT BE EXCLUDED UNDER § 541(a)(6)

After considering the testimony presented, the case law cited by counsel, the pleadings and the exhibits entered into evidence, this Court finds that the Debtor acted as the Seller's Agent in connection with the Subject Contract. This Court further finds that neither the Subject Contract nor the Debtor's testimony indicated that any conditions or contingencies were placed upon the earning of the commissions by the Debtor. Moreover, this Court finds that the failure of the Debtor to obtain a written listing agreement does not defeat or alter the Debtor's pre-petition right to receive the commission from the Broker.

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The Debtor testified that the six percent (6%) commission, or \$556,200.00, payable under the Subject Contract would be divided so that three percent (3%), or \$278,100.00, would be paid to Gerhart Realty, the Buyer's agent, and the other three percent (3%), or \$278,100.00, would be paid to the Broker. Broker was obligated to pay six percent (6%) of its share, or approximately \$16,686.00, to a parent corporation for franchise fees. The remainder, or approximately \$261,414.00, would be equally divided between Broker and Debtor. This Court finds that, based on the Debtor's testimony, which was clear and uncontradicted, the Debtor is to receive \$130,707.00 in commissions from the sale of the subject property.

This Court further finds that there is no provision in the Subject Contract or in the relationship between the Broker and the Debtor which requires the Debtor to perform services after the execution of the Subject Contract in order to earn his commission. In fact, the language of the Subject Contract itself implies that the commissions were earned upon the signing of the contract notwithstanding the fact that the closing was to be held at a later date and post-petition. Therefore, since the Subject Contract was entered pre-petition, this Court finds that the commissions were earned pre-petition.

Since the real estate commissions owed to the Debtor in connection with the Subject Contract are pre-petition assets and

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are not dependent upon post-petition services, they are property of the estate which may not be excluded under 11 U.S.C. § 541(a)(6).

This finding is consistent with the holding in the case of Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 232 S.E.2d 728 (1977). In this case, the Supreme Court of South Carolina held that the Broker was entitled to receive the real estate commission even though the sale was never consummated. The Court explained that the general rule is that "a Broker has earned his commission when he procures a purchaser who is accepted by the owner of the property and with whom the latter, uninfluenced by any representation or fraud on the part of the Broker, enters into a valid and enforceable contract, and that such right to compensation would not be defeated by the failure or refusal of the purchaser to consummate the contract." Although the parties to the contract may make the payment of the commission contingent upon some future performance, the Court stated that "the parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof" when the agreement involves a written contract. See also Cass Co. v. Nannarello, 274 S.C. 326, 262 S.E.2d 924 (1980); Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404, (S.C. App.1984); and Bishop Realty and Rentals, Inc. v. Perk, Inc., 355 S.E.2d 298, 292 S.C. 182 (S.C. App.1987).

Additionally, in the bankruptcy arena, courts have relied upon their state's law to determine when real estate commissions are earned. In the case of In Re Taylor & Campaigne, Inc. 149 B.R. 993

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(Bkrtcy. M.D. Fla. 1993), aff'd 157 B.R. 493 (M.D. Fla. 1993), the bankruptcy court, interpreting Ohio law, held that the real estate commission was earned pre-petition "at the time [the broker] located a purchaser ready, willing, and able to buy the property in question on terms acceptable to the seller." The Court further stated that "the fact that the commission was paid at a closing that occurred post-petition does not change the result."

2. THE DEBTOR IS NOT ENTITLED TO CLAIM AN EXEMPTION IN THE REAL ESTATE COMMISSIONS UNDER S.C. CODE § 15-39-410.

Secondly, the Debtor has asserted that he is entitled to an exemption in the commissions, pursuant to S.C. § 15-39-410, which provides as follows:

"The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person or due to the judgment debtor, to be applied toward the satisfaction of the judgment, except that the earnings of the debtor for his personal services cannot be so applied."

Relying upon this code section, the Debtor asserts that the real estate commissions are his pre-petition earnings which are exemptible in his bankruptcy proceeding. The debtor could not cite nor could this court find any case law authority which applied S.C. Code § 15-39-410 in a bankruptcy proceeding. There is very little case law interpreted of this statute and what there is was decided prior to the 1960s.

Based upon a literal reading of the statute, it appears that this statute was interrupted to apply in instances of supplemental proceedings or instances of execution of judgments and not in bankruptcy proceedings. This court notes that the general state

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exemption statutes, S.C. Codes § 15-41-310, et. seq., enacted by the legislature as part of this state's opt out of the federal bankruptcy exemptions under 11 U.S.C. § 522(b), specifically refers to and makes exemptions under that statute applicable to bankruptcy proceedings. It is reasonable to infer that if the state legislature intended § 15-39-410 to apply in bankruptcy proceedings, it would have so stated.

This court further believes that S.C. Code § 15-39-410 does not apply to a right to receive a real estate commission in instances such as presented in this case.

IT IS THEREFORE ORDERED that the real estate commissions payable to the Debtor under the Subject Contract and under the Debtor's agreement with Broker as described above are property of the estate and may not be excluded under 11 U.S.C. § 541(a)(6).

IT IS FURTHER ORDERED that the Trustee's objection to the Debtor's claim to an exemption in the commissions pursuant to S.C. § 15-39-410 is sustained.

AND IT IS SO ORDERED.

  
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JUDGE JOHN E. WAITES  
Bankruptcy Judge

COLUMBIA, SC  
14<sup>th</sup> day of April, 1995